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No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989), which provides interim statutory standards not subject to judicial review for management of national forest timber sales that had been challenged in pending federal court actions, violates the constitutional principle of separation of powers.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Pilchuck Audubon Society, Washington Environmental Council, Washington, Native Plants Society, Oregon Natural Resources Defense Council Inc., Portland Audubon Society, Lane County Audubon Society, and Siuslaw Task Force were plaintiffs in the district court (W.D. Wash.) and appellants in the court of appeals. Washington Contractor Loggers Association and William Pickell were also plaintiffs in the district court and appellees in the court of appeals.

Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council were plaintiffs in the district court (D. Or.) and appellants in the court of appeals. Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O & C Counties, and Benton County were defendants/intervenors in the district court and appellees in the court of appeals.

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No.

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of F. Dale Robertson, Chief, United States Forest Service, the United States Forest Service, Department of Agriculture, and Manuel Lujan, Jr., Secretary of the Interior,[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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[1] The caption of the court of appeals' opinion erroneously omitted Manuel Lujan, Jr., Secretary of the Interior, as a defendant-appellee in the consolidated appeal from the judgment of the United States District Court for the District of Oregon, *Portland Audubon Society* v. *Lujan*, No. CV-87-1160-FR (D. Or. Dec. 21, 1989).

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-17a) is not yet reported. The initial opinion of the court of appeals is reported at 914 F.2d 1311. The opinion and order of the district court in *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash.) (App., *infra*, 20a-28a, 29a-34a) are unreported. The opinion of the district court in *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or.) (App., *infra*, 35a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990. Petitions for rehearing were denied on January 16, 1991. App., *infra*, 18a-19a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATUTORY PROVISION INVOLVED

Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989), provides:

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[2] Before the court of appeals denied the petitions for rehearing, the government applied for an extension of time within which to file a petition for a writ of certiorari. On December 10, 1990, Justice O'Connor granted that application, thereby extending the deadline to and including February 15, 1991. The court of appeals' order denying the timely petitions for rehearing on January 16, 1991, however, superseded the extended deadline for seeking certiorari under Rule 13.4 of the Rules of this Court. See also *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1660-1662 (1990); Fed. R. App. P. 40(a); 9th Cir. Local R. 35-3 Advisory Committee Note.

> Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), is reproduced in its entirety at App., *infra*, 43a-55a.

STATEMENT

This case involves "the ongoing controversy over logging in old growth forests in Oregon and Washington and the impact of that logging on the northern spotted owl." App., *infra*, 5a. Old-growth forests provide natural habitat for the northern spotted owl—a threatened species.[3] In the late 1980's respondents, the Seattle Audubon Society, the Portland Audubon Society, and other environmental groups, filed actions in the Western District of Washington and the District of Oregon challenging the federal government's effort to continue logging old-growth timber in government-owned forests located in the Pacific Northwest.

During the pendency of those federal court proceedings, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), also known as the Northwest Timber Compromise. Section 318, as described by Congress, "sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old-growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). In light of directives set forth in Section 318, the district courts concluded that the statute by its terms precluded respondents' claims for relief.

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[3] In June 1990, during the pendency of respondents' lawsuits, the United States Fish and Wildlife Service listed the northern spotted owl as a threatened species under the Endangered Species Act, 16 U.S.C. 1531 *et seq.* See 55 Fed. Reg. 26,114 (1990).

The Ninth Circuit reversed, holding that Section 318(b)(6)(A) violates the constitutional principle of separation of powers set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). The court of appeals determined that Section 318(b)(6)(A) "does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." App., *infra*, 14a. In the court's view, "[t]his is what *Klein* and subsequent cases agree is constitutionally proscribed." *Ibid.* Accordingly, the court of appeals remanded for consideration of the merits of respondents' challenges.

A. Initial Proceedings in the District Courts and Court of Appeals

1. *Seattle Audubon Society* v. *Robertson*

In February 1989, respondents filed an action against the Chief of the United States Forest Service, Department of Agriculture, in the United States District Court for the Western District of Washington.[4] Respondents contended that the Forest Service's plan for managing northern spotted owl habitat in the national forests located in Washington and Oregon violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.*, and the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*[5] Respondents

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[4] This action mirrored a previously filed action against the Secretary of the Interior that was pending in the District of Oregon. See pp. 6-7, *infra*.

[5] The Washington Contract Loggers Association filed a similar action against the Forest Service, "challenging the

sought declaratory and injunctive relief, barring the Forest Service from implementing its plans. App., *infra*, 6a, 30a-32a.

In a series of rulings issued in the spring of 1989, the district court enjoined 163 planned timber sales in Washington and Oregon. Those sales involved sites containing 40 acres or more of old-growth timber. App., *infra*, 6a, 30a-33a.

2. *Portland Audubon Society* v. *Lujan*

In October 1987, respondents had filed a similar action against the Secretary of the Interior in the United States District Court for the District of Oregon. Respondents principally contended that the Bureau of Land Management's decision to continue logging old-growth timber on BLM-managed lands in western Oregon, on the basis of timber management plans that had not adequately considered the detrimental effects to the northern spotted owl population, violated NEPA.[5] Respondents sought declaratory and injunctive relief barring the Secretary from continuing to implement his plans for logging old-growth timber on BLM-managed lands in Oregon. App., *infra*, 5a, 36a-37a.

In April 1988, the district court dismissed the action, holding that Section 314 of the Department of the Interior and Related Agencies Appropriations

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[Service's] guidelines as overly restricting timber harvesting." App., *infra*, 6a. The district court consolidated that action with respondents' lawsuit. *Id.* at 31a.

[5] Respondents also alleged claims under the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181a *et seq.*, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.* App., *infra*, 5a, 36a-37a.

Act, 1988, Pub. L. No. 100-202, Tit. III, 101 Stat. 1329-254 (1987), precluded judicial review of respondents' claims.[7] In January 1989, however, after granting respondents' request to enjoin temporarily certain timber sales pending appeal, the court of appeals reversed and remanded for further proceedings. *Portland Audubon Society* v. *Hodel*, 866 F.2d 302 (9th Cir.), cert. denied, 109 S. Ct. 3229 (1989).[8]

On remand in May 1989, the district court again dismissed respondents' action on the basis of the statutory bar contained in Section 314. *Portland Audubon Society* v. *Lujan*, 712 F. Supp. 1456 (D. Or. 1989). In September 1989, the court of appeals affirmed the district court's dismissal of respondents' NEPA claim, but reversed and remanded the court's

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[7] In pertinent part, Section 314 provided that

> there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

101 Stat. 1329-254.

Congress later reenacted that express provision. See Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-446, Tit. III, § 314, 102 Stat. 1825-1826; Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 312, 103 Stat. 743. The validity and effect of that provision is not at issue here.

[8] The court of appeals also vacated the previously entered stay "without prejudice to any appropriate renewed efforts by [respondents] to obtain such temporary remedies, if any, as the district court may deem necessary and proper." 866 F.2d at 309-310.

dismissal of respondents' claims under OCLA, FLPMA, and MBTA. *Portland Audubon Society* v. *Lujan*, 884 F.2d 1233 (9th Cir. 1989), cert. denied, 110 S. Ct. 1470 (1990).[9]

B. Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990

In the midst of the disruption caused by the federal court injunctions issued in the course of respondents' lawsuits, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), in order to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." H.R. Conf. Rep. No. 264, *supra*, at 87. Consequently, as effective October 23, 1989, Section 318 "sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old-growth forest stands." *Ibid.*

1. Section 318 requires the United States Forest Service to sell a certain amount of timber in Washinton and Oregon national forests, including timber in areas "known to contain northern spotted owls." § 318(a)(1), 103 Stat. 745. The statute also establishes standards for governing the Forest Service's choice of particular sites for proposed sales. § 318

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[9] During the course of this expedited appeal, the court of appeals had stayed further timber sales on the BLM-managed lands at issue. 884 F.2d at 1234. The court vacated that stay when it issued its final decision. *Id.* at 1242.

(b)(1) and (2), 103 Stat. 745-746.[10] In order to protect the 1990 timber sale programs from litigation disruptions, Section 318(g) provides streamlined judicial review procedures. In particular the statute prohibits federal courts from issuing any

> restraining order or preliminary injunction * * * with respect to any decision * * * [regarding] timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and [BLM] lands in western Oregon known to contain northern spotted owls.

§ 318(g)(1), 103 Stat. 749. On the other hand, the statute provides that courts

> shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale is arbitrary, capricious, or otherwise not in accordance with law.

§ 318(g)(1), 103 Stat. 749.[11]

2. Section 318 also contains specific provisions regarding respondents' pending federal court actions.

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[10] Section 318(b)(3) forbids timber sales in those spotted owl habitat areas located in Washington and Oregon identified by the Forest Service as a result of a formal administrative decision issued in December 1988. 103 Stat. 746. Section 318(b)(3) also forbids such sales in additional portions of national forests identified in the statute. 103 Stat. 746. Section 318(b)(5) forbids timber sales in those BLM-managed lands in Oregon that both the BLM and the Oregon Department of Fish and Wildlife agreed in December 1987 contained spotted owl habitat. 103 Stat. 746-747.

[11] The statute calls for expedited review of challenged timber sales. § 318(g)(1), 103 Stat. 749-750.

As an initial matter, Congress declined to "pass[] on the legal and factual adequacy of [the Forest Service's formal administrative December 1988 decision and the December 1987 agreement between BLM and Oregon state authorities]," each of which formed part of the substantive standards provided in Section 318(b). § 318(b)(6)(A), 103 Stat. 747. Congress next specifically

> determine[d] and direct[ed] that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and [BLM] lands in western Oregon known to contain northern spotted owls *is adequate consideration for the purpose of meeting the statutory requirements that are the basis for* [respondents' pending federal court actions].

§ 318(b)(6)(A), 103 Stat. 747 (emphasis added).[12] Congress further emphasized its goal of streamlining the pending actions, providing that "[t]he guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." § 318(b)(6)(A), 103 Stat. 747.

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[12] With respect to the *Seattle Audubon Society* litigation, Congress directed the parties to try to agree on a list of sales subject to the outstanding injunction that would provide at least 1.1 billion board feet of timber for fiscal year 1990. § 318(f), 103 Stat. 748-749. The statute further provided that "[s]elected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is [the] basis for any stay, injunction or order issued [in the *Seattle Audubon Society* action]." § 318(f)(3), 103 Stat. 749.

C. District Court Proceedings In Light Of Section 318

1. *Seattle Audubon Society* v. *Robertson*

As a result of the express provisions of Section 318, the government in October 1989 asked the district court to vacate the preliminary injunction it had previously entered barring the 163 planned timber sales in Washington and Oregon. Respondents countered that Section 318(b)(6)(A) is unconstitutional, contending that Congress impermissibly directed the result in pending actions and otherwise unlawfully barred judicial review of the one-year guidelines established by the statute. App., *infra*, 23a.

In November 1989, the district court granted the government's motion, rejected respondents' constitutional challenge, and vacated the preliminary injunction. App., *infra*, 20a-28a, 29a-34a. The court concluded that Section 318(b)(6)(A) "does not require a particular decision on the issues of this case." *Id.* at 24a. On the contrary, the court determined, "Congress has adopted the Forest Service's proposed guidelines, challenged by [respondents], as statutory law for a period of one year." *Ibid.* Congress has "the power to do this," the court recognized, since "[j]ust as Congress may create a geographic exception to the environmental laws, it may also create a temporal exception." *Ibid.* The court also rejected respondents' contention that the statute's bar to judicial review is unconstitutional, noting that Congress may restrict federal court jurisdiction, and that Section 318(b)(6)(A) "means only that, as new statutory law, the guidelines [mandated in subsections (b)(3) and (b)(5)] cannot be tested in court for compliance with the National Forest Management

Act, [NEPA], or other general environmental statutes." App., *infra*, 25a-26a.[13]

2. *Portland Audubon Society* v. *Lujan*

In the district court, the government similarly sought dismissal of respondents' pending claims in view of newly enacted Section 318. Respondents contended that Section 318(b)(6)(A), which in their view prescribed a rule of decision in the pending action, violates the constitutional principle of separation of powers. App., *infra*, 37a.

In December 1989, the district court granted the government's motion and dismissed as moot for fiscal year 1990 respondents' statutory claims. App., *infra*, 35a-42a. The court rejected respondents' constitutional challenge, adopting the "reasoning and result" of the district court in the *Seattle Audubon Society* case. *Id.* at 37a.[14]

D. The Court Of Appeals Decision

In September 1990, the court of appeals reversed, holding that Section 318(b)(6)(A) violates the constitutional principle of separation of powers. App., *infra*, 1a-17a. Relying principally on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), and *United States* v. *Sioux Nation*, 448 U.S. 371 (1980), the court stated that the

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[13] In January 1990, the district court certified respondents' constitutional challenge to Section 318(b)(6)(A) for interlocutory appeal under 28 U.S.C. 1292(b). App., *infra*, 8a.

[14] Respondents noted an appeal from the district court's final judgment dismissing their action. The court of appeals later consolidated the separate appeals noted from the Seattle and Portland actions. App., *infra*, 8a.

> critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.

App., *infra*, 11a-12a.

Turning to Section 318(b)(6)(A), the court determined that the statute "does not, by its plain language, repeal or amend the environmental laws underlying this litigation." App., *infra*, 13a. To the contrary, the court stated that "[t]he clear effect of subsection (b)(6)(A) is to direct [the court] that, if the government follows the plan incorporated in subsection (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases." *Ibid.*

Having construed the statute in this manner, the court concluded that "[i]n this way Congress, through Section 318, seeks to perform functions reserved to the courts by Article III of the Constitution." App., *infra*, 14a. In other words, Section 318(b)(6)(A) "does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." App., *infra*, 14a. In the court's view, "[t]his is what Klein and subsequent cases agree is constitutionally proscribed." *Ibid.*[15]

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[15] The court made clear that its holding extended only to the "first sentence of subsection 318(b)(6)(A)." App., *infra*, 17a. The court "express[ed] no opinion on the validity of the second and final sentence of subsection (b)(6)(A)." *Id.* at 17a n.4.

Finally, the court of appeals noted that "even if [it] could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes." App., *infra*, 16a. Relying on *TVA* v. *Hill*, 437 U.S. 153 (1978), and circuit precedent, the court stated that Congress could not partially repeal substantive law in an "appropriations measure." *Ibid.*[16]

E. District Court Proceedings On Remand From Court Of Appeals' Invalidation Of Section 318(b)(6)(A)

1. *Seattle Audubon Society* v. *Robertson*

Several days after the court of appeals issued its mandate, the district court rejected respondents' challenge to six 1990 timber sales on the ground that they were untimely under the 15-day limitations period set forth in Section 318(g)(1), 103 Stat. 749. *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash. Sept. 29, 1990). Respondents' appeal from that judgment is pending before the court of appeals. *Seattle Audubon Society* v. *Robertson*, No. 90-35774 (9th Cir.) (argued Feb. 11, 1991). In that appeal, respondents take the position that the limitations period is subject to equitable tolling. Respondents have thus suggested that if their position prevails, they will seek to challenge any number of 1990 timber sales. See, *e.g.*, Resp. C.A. Reply Br. 9 n.7.[17]

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[16] Before denying petitions for rehearing in January 1991, App., *infra*, 18a-19a, the panel issued an order amending its opinion, *id.* at 3a-4a. The opinion reprinted in the Appendix, *id.* at 4a-17a, incorporates these amendments.

[17] In connection with the ongoing litigation, respondents have recently sought from the Forest Service information

Respondents also renewed their substantive claims regarding otherwise timely challenges under Section 318(g)(1) to twelve 1990 timber sales. In December 1990, the district court set aside those sales for violations of NEPA, NFMA, MBTA. *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash. Dec. 19, 1990), appeal filed (9th Cir. Feb. 15, 1991).[18]

2. ***Portland Audubon Society* v. *Lujan***

In December 1990, the district court entered an order vacating its previous dismissal of respondents' action. *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or. Dec. 1990). Respondents' action, which appears to challenge any number of 1990 and 1991 timber sales that contain spotted owl habitat, remains pending before the court. In connection with that ongoing litigation, respondents have recently sought from the BLM information regarding all fiscal year 1990 timber sales on which there remains uncut timber. Resps. Second Set of Interrogatories, *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or.) (filed Jan. 3, 1991).[19]

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regarding all fiscal year 1990 timber sales on which there remains uncut timber. Resps. Second Set of Interrogatories, *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash.) (filed Jan. 3, 1991).

[18] The district court recently rejected the government's motion to vacate the injunction regarding the twelve 1990 timber sales. *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash. Mar. 7, 1991).

[19] There is one other challenge to 1990 timber sales pending in the District of Oregon. See *Citizens Interested in Bull Run* v. *Edington*, No. 90-844-MA (D. Or.). The district court recently resolved another such challenge in the govern-

REASONS FOR GRANTING THE PETITION

The court of appeals has held an Act of Congress unconstitutional. The court of appeals' holding—that Section 318(b)(6)(A) prescribes a rule of decision in violation of the constitutional principle set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871)—misapprehends the statutory terms, invokes a substantially overbroad interpretation of the *Klein* decision, and conflicts with other federal courts' applications of that nineteenth century precedent. Moreover, the court of appeals' decision has undermined Congress's interim solution for averting a devastating crisis to the timber industry and local economies of the Pacific Northwest. Given the confusion among the lower courts regarding the reach of *Klein*'s constitutional proscription, and the looming threat to the stability of the timber industry and economies of the Pacific Northwest occasioned by the court of appeals' decision, review by this Court is warranted.[20]

1. a. In its haste to strike down Section 318 (b)(6)(A) as unconstitutionally prescribing a rule of decision, the court of appeals misapprehended the

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ment's favor. See *Oregon Natural Resources Defense Council* v. *United States Forest Service*, No. 90-904-RE (D. Or. Apr. 2, 1991).

[20] Although Section 318 expired by its terms at the close of fiscal year 1990, this controversy remains live and justicable. Section 318(k), 103 Stat. 750, provides that "[t]imber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sales contracts." Moreover, respondents have successfully enjoined a number of 1990 timber sales as a result of the court of apeals' decision and are endeavoring to block or undermine additional 1990 sales. See pp. 14-15, *supra*; pp. 25-26, *infra*.

statutory terms. By its terms, Section 318(a) *requires* the Forest Service and BLM to sell during fiscal year 1990 a certain amount of timber in Washington and Oregon forests, including timber in areas "known to contain northern spotted owls." § 318(a)(1), 103 Stat. 745.[21] Section 318(b) then sets the applicable statutory guidelines for the federal government's choice of particular sites for proposed 1990 sales. In particular, Section 318(b)(1) directs the Forest Service to use its discretion in selecting sites to minimize "fragmentation" of old-growth timber, 103 Stat. 745-746, and Sections 318(b)(3) and (5) then carve out specific forest areas to be excepted from the available offering sites, 103 Stat. 746-747.[22] Section 318(b) thus provides the governing plans for 1990 timber sales offered by the Forest Service and BLM in the forests at issue in respondents' pending lawsuits. And in the final sentence of Section 318(b)(6)(A), Congress expressly insulated those plans from judicial review.

Section 318—by its terms—therefore disabled the Forest Service and BLM during 1990 from imple-

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[21] The statute specifically mandates that a substantial portion of the specified sales level of more than 7 billion board feet of net merchantable timber (70% or 5.8 billion board feet) must be "offered from the thirteen national forests in Oregon and Washington known to contain northern spotted owls." § 318(a)(1), 103 Stat. 745.

[22] In particular, Congress excepted those spotted owl habitat areas located in Washington and Oregon previously identified by the Forest Service in December 1988, and others listed in subsection (b)(3), Section 318(b)(3), 103 Stat. 746, and those BLM-managed lands in Oregon that both the BLM and state authorities previously agreed in December 1987 contained spotted owl habitat, Section 318(b)(5), 103 Stat. 746-747.

menting the particular timber management plans respondents were challenging in their pending federal court actions. Instead, the statute "provides that for fiscal year 1990 the new standards adopted by Congress in subsections (b)(3) and (b)(5) will apply, and will be adequate for that year." App., *infra*, 24a. Those new standards, which respondents could not challenge because the final provision of Section 318 (b)(6)(A) insulates them from judicial review, amounted to nothing other than a "temporary modification of the environmental laws." App., *infra*, 25a. The court of appeals thus needlessly and erroneously created a constitutional question by construing Section 318 as "direct[ing] the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." *Id.* at 14a.

b. The court of appeals avoided this straightforward reading of Section 318 by invoking the "doctrine disfavoring repeals by implication," particularly where the "subsequent legislation is an *appropriations* measure." *TVA* v. *Hill*, 437 U.S. 153, 190 (1978); See App., *infra*, 16a. In *Hill*, the Court applied that doctrine in circumstances where the appropriations statute itself contained no language exempting the federal project at issue from the requirements of the Endangered Species Act; the only suggestions of intent to create such an exemption were in the appropriations statute's legislative history. 437 U.S. at 189-191, 195.

Here, by contrast, the express terms of Section 318 displace, for fiscal year 1990, the requirements of environmental statutes otherwise applicable to timber sales in the Pacific Northwest. This Court has long recognized that "when Congress desires to suspend or

repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940)); see *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). The court of appeals therefore erred in relying on the canon of construction utilized in *Hill*, and in disregarding the express terms of Section 318 by virtue of that provision's pedigree.

2. The court of appeals compounded its erroneous construction of Section 318 by invoking a substantially overbroad interpretation of this Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). The court's treatment of *Klein*, which cannot be squared with other circuits' reading of that decision, highlights the need for this Court to revisit what has become a confusing precedent.

a. In the wake of the Civil War, Congress enacted legislation giving former owners of property seized by the government, on proof of loyalty, a right of action to recover proceeds from the federal government's sale of their property. This Court held that a presidential pardon was sufficient proof of loyalty entitling its recipient to recover. *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1869).

In 1865, Klein, the administrator of Wilson's estate, filed a petition to collect the proceeds from the sale of Wilson's cotton seized by the Union during the war. In 1868, the Court of Claims determined that although Wilson had been disloyal to the Union, a presidential pardon entitled the estate to recover the proceeds. *Wilson* v. *United States*, 4 Ct. Cl. 559 (1868). Pending the government's appeal from that judgment to this Court, Congress enacted a statute providing that

no presidential pardon should be admissible as proof of loyalty, that acceptance without written protest or disclaimer of a pardon reciting that the claimant took part in or supported the rebellion in fact should be conclusive evidence of the claimant's disloyalty, and that the Court of Claims and this Court must dismiss for want of jurisdiction any pending claims based on a presidential pardon. Act of July 12, 1870, ch. 251, 16 Stat. 235; see *Klein*, 80 U.S. (13 Wall.) at 132-134, 143-144.

In affirming the Court of Claims' judgment for Wilson's estate, this Court declared the 1870 statute unconstitutional. *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). First, Congress had exceeded its constitutional power to limit the Court's appellate jurisdiction:

> It is evident * * * that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.
>
> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.
>
> * * * * *
>
> Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? The question seems to us to answer itself.

Klein, 80 U.S. (13 Wall.) at 146-147. Second, the Court held that the rule of decision at issue—which "impair[ed] the effect of a pardon"—impermissibly "infring[ed] the constitutional power of the Executive." *Id.* at 147.

b. The *Klein* decision "is not a model of clarity." P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369 (3d ed. 1988). Indeed, this Court has not interpreted *Klein* with one voice. First, the Court has treated the decision narrowly as holding that Congress may not "attempt to prescribe to the judiciary the effect to be given to a [presidential] pardon, in regard to a matter in which the pardon extended." *Hart* v. *United States*, 118 U.S. 62, 66 (1886); accord *Carlisle* v. *United States*, 83 U.S. (16 Wall.) 147, 152 (1872); see *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 467 (1989) (Kennedy, J., concurring in the judgment). Second, *Klein* has been described broadly as holding that Congress may not "attempt to invade the judicial province by prescribing a rule of decision in a pending case." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962) (plurality opinion).

Finally, the Court has read *Klein* as resting on an amalgam of those rationales: Congress may not "prescribe[] a rule of decision in a case pending before the courts, and [do] so in a manner that required the courts to decide a controversy in the Government's favor," and Congress may not "impair[] the effect of a pardon, and thus infring[e] the constitutional power of the Executive." *United States* v. *Sioux Nation*, 448 U.S. 371, 404-405 (1980) (citation omitted); accord *Austin* v. *United States*, 155 U.S. 417, 424-425 (1894).

c. The courts of appeals' disparate treatment of *Klein* reflects the mixed signals this Court has sent. The Third Circuit has read *Klein* as suggesting that Congress may not interfere with a court's ability to adjudicate a pending case. *Temple University* v. *United States*, 769 F.2d 126, 134 n.4 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986). Other circuits have construed *Klein* as standing for the propositions that Congress may not enact a rule of decision for a particular case, see, *e.g.*, *Demartino* v. *Commissioner*, 862 F.2d 400, 408 (2d Cir. 1988), and that Congress may not attack a final judgment with new legislation, see, *e.g.*, *Barcellos & Wolfsen* v. *Westlands Water Dist.*, 899 F.2d 814, 830 (9th Cir.), cert. denied, 111 S. Ct. 555 (1990). The D.C. Circuit has treated *Klein* as limiting Congress's authority to prescribe federal court jurisdiction. *Bartlett* v. *Bowen*, 816 F.2d 695 (D.C. Cir. 1987); but see *National Juvenile Law Center, Inc.* v. *Regnery*, 738 F.2d 455, 465 (D.C. Cir. 1984) (per curiam) (noting divergent views of *Klein*, but declining to "decide what the proper scope of the *Klein* holding is").

Other circuits have adopted further variations of *Klein*. Following a suggestion made by commentators, the Fourth Circuit has construed *Klein* as prohibiting Congress from enacting legislation that

> dictate[s] "how the Court should decide an issue of fact (under threat of loss of jurisdiction)" and purports to "bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds."

United States v. *Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (quoting P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 316 n.4 (2d ed. 1973)); see

Memorial Hosp. v. *Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983).[23]

The Ninth Circuit, as the decision below exemplifies, treats *Klein* differently. In that court's view, *Klein* holds that Congress may not *either* "direct[] the court to reach a specific result and make certain factual findings under existing law in connection with * * * cases pending in federal court," App., *infra*, 14a, *or* "require[] [the court] to apply an unconstitutional law," *Grimesy* v. *Huff*, 876 F.2d 738, 744 (9th Cir. 1989) (citation omitted). See App., *infra*, 12a-13a; *Stop H-3 Ass'n* v. *Dole*, 870 F.2d 1419, 1437 n.26 (9th Cir. 1989); *Konizeski* v. *Livermore Labs (In re Consolidated United States Atmospheric Testing Litigation)*, 820 F.2d 982, 992 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988); see also P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369 n.4 (3d ed. 1988).

d. In this case, the Ninth Circuit has mistakenly construed *Klein* as prohibiting Congress from enacting changes in substantive law to function as rules of decision in pending federal court actions. As one court of appeals has aptly noted:

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[23] The most recent edition of *Hart & Wechsler's The Federal Courts and The Federal System* retracts the earlier suggestion that *Klein* limits Congress's authority to govern the fact-finding process. P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369-370 n.5 (3d ed. 1988). The editors point out that *Klein* contained no such holding "since the parties had in effect stipulated that, absent the pardon, the decedent's conduct required a finding of disloyalty." *Id.* at 370 n.5 (citing Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States *v.* Klein *Revisited*, 1981 Wis. L. Rev. 1189, 1233-1238).

> Pending cases are often affected by the actions of coordinate branches of government. * * * [T]he general rule is that, if Congress changes the law while a case is pending, the courts are obligated to apply the law as they find it at the time of judgment (including appellate judgment).

National Juvenile Law Center, Inc. v. *Regnery*, 738 F.2d at 465; see *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801).

And, wholly apart from any controversy concerning the continuing validity of the rule of *Bradley* and *The Schooner Peggy*, see *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1576-1578 (1990); *id.* at 1579-1585 (Scalia, J., concurring); *id.* at 1591-1594 (White, J., dissenting), it is well settled that Congress may constitutionally specify that its enactments changing substantive law are to be applied retroactively. See *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 728-731 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). For that reason, it is apparent that "*Klein* could not possibly stand for the proposition that *any* attempt by [Congress] to affect pending cases is unconstitutional." *National Juvenile Law Center, Inc.* v. *Regnery*, 738 F.2d at 465.

In this case, Congress has acted well within its authority in enacting legislation regarding the management and disposition of public property. U.S. Const. Art. IV, § 3, Cl. 2; see *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976); *United States* v. *San Francisco*, 310 U.S.

16, 29 (1940). The decision below, rather than finding any independent constitutional infirmity with Section 318(b)(6)(A), effectively determined that the statute amounted to a congressionally mandated conclusive presumption. But a statutorily prescribed conclusive presumption is merely a particular form of enactment of a substantive rule. If the rule itself is constitutionally permissible—as is the case here—then the form of its enactment as a conclusive presumption is not proscribed by the Constitution, *Klein*, or any other decision of this Court. See *United States* v. *Locke*, 471 U.S. 84, 98-100 (1985); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 28; *Tot* v. *United States*, 319 U.S. 463, 467-468 (1943).

3. The substantial practical significance of the court of appeals' decision is not diminished by the statute's expiration at the close of fiscal year 1990. First, the court of appeals' striking down of Section 318(b)(6)(A) has enabled respondents to overturn twelve 1990 timber sales and paves the way for respondents' similar efforts regarding every other outstanding 1990 timber sales. See pp. 14-15, *supra*.

Second, the statute—despite its expiration—continues to affect an enormous quantity of timber. Section 318(k), 103 Stat. 750, provides that "[t]imber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sales contracts." In the *Seattle Audubon Society* litigation, the Forest Service estimates that approximately four billion board feet of timber sold under the terms of Section 318 during 1990 remain uncut; in the *Portland Audubon Society* litigation, the BLM estimates that approximately 1.1 billion board feet of timber fall within that category.

Finally, as the litigation unfolding on remand vividly shows, the Ninth Circuit has opend the door to

the very dilemma Congress sought to avoid when it enacted Section 318 as a legislative compromise—the prospect of a timber crisis in the Pacific Northwest, with attendant uncertainty, unemployment, and litigation-driven contractions to the timber supply. The real—and potentially devastating—consequences of the Ninth Circuit's ruling call for this Court's review now. As Senator Adams noted when Congress was considering passage of Section 318:

> Unfortunately, the severity of the crisis this year did not give us the luxury of time to slowly mull over this issue. Mills were shutting down. Jobs were threatened and gone. Our State was being torn apart, and tensions were rising with the very real potential of violence.

135 Cong. Rec. S12,961 (daily ed. Oct. 7, 1989). The same holds true today, since the Ninth Circuit has effectively turned back the clock.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 90-35020, 90-80008
D.C. No. CV-89-160WD

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES DEFENSE COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON, in his official capacity as Chief, United States Forest Service; UNITED STATES FOREST SERVICE, an agency of the United States, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

No. 90-35120
D.C. No. 87-1160-FR

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES DEFENSE COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON; UNITED STATES FOREST SERVICE, DEFENDANTS-APPELLEES

NORTHWEST FOREST RESOURCE COUNCIL; ASSOCIATION OF O & C COUNTIES, DEFENDANTS/INTERVENORS-APPELLEES

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge Presiding

ORDER AND AMENDED OPINION

Argued and Submitted
April 3, 1990—San Francisco, California

Filed September 18, 1990
Amended October 30, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Harry Pregerson,
Circuit Judges.

Opinion by Judge Pregerson

ORDER

The opinion filed on September 18, 1990 is amended as follows:

On slip opinion page 11794, the last sentence shall begin with "Subsection (b)(6)(A)" instead of "Section 318."

On slip opinion page 11798, in the last sentence of the first full paragraph, the reference to "section 318" shall be changed to "subsection (b)(6)(A)."

On slip opinion page 11798, in the second full paragraph, the first three sentences shall be replaced with the following:

> Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements.[1] The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases.

On slip opinion page 11798, a new footnote ≟1 shall read:

> For example, subsection (b)(2) requires that fragmentation of ecologically significant old growth forest stands be minimized, and subsections (b)(3) and (b)(5) forbid timber sales in specified areas where spotted owls are found.

On slip opinion page 11799, the first line of the first full paragraph shall be replaced with:

> Subsection (b)(6)(A), at issue here, does not establish new law, but

In the first line of the second full paragraph on slip opinion page 11799, the reference to "section 318" shall be changed to "subsection (b)(6)(A)."

On slip opinion page 11801, the last sentence preceding the conclusion shall be changed to read:

> These principles preclude a saving interpretation of subsection (b)(6)(A).

On slip opinion page 11801, after the heading labeled "CONCLUSION," the opinion shall read:

> Although the legislative history of section 318 disguises the act as changing legal standards, the statutory language itself does not do so. The first sentence of subsection (b)(6)(A) violates the separation of powers doctrine.[4]
>
> The judgments of the district courts are REVERSED. The cases are remanded to the district courts for proceedings consistent with this opinion. This order shall act as and for the mandate in these cases and the pending motion to recall the mandate is denied.

Footnotes ⁼1 and ⁼2 shall be renumbered respectively as footnotes ⁼2 and ⁼3. In the last sentence of former footnote ⁼2, which shall now be the new footnote ⁼3, the reference to "section 318" shall be changed to "subsection (b)(6)(A)."

A new footnote ⁼4 should be added at the end of the first paragraph under the heading labeled "CONCLUSION" as follows:

> We express no opinion on the validity of the second and final sentence of subsection (b)(6)(A).

OPINION

PREGERSON, Circuit Judge:

These consolidated appeals arise out of the ongoing controversy over logging in old growth forests in Oregon and Washington and the impact of that logging on the northern spotted owl. In response to ongoing legal disputes, Congress enacted section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. 701, 745-50 (1989) ("section 318"). Section 318 would allow timber sales in old growth forests in Oregon and Washington in fiscal year 1990. The issue before us is whether section 318 violates the separation of powers doctrine by directing the judiciary to reach a particular result in the two cases underlying this appeal.

BACKGROUND

In October 1987, the Portland Audubon Society ("Portland Audubon") and other environmental organizations filed an action in district court for declaratory and injunctive relief, challenging forest management activities of the Bureau of Land Management, U.S. Department of the Interior ("BLM"), as violating the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321-4347, the Oregon & California Lands Act, 43 U.S.C. § 1181, the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784, and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-718. The district court dismissed the action, and we reversed. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, —— U.S. ——, 109 S. Ct. 3229 (1989). On remand, the district court again dismissed the action. *Portland Audubon Soc'y*

v. Lujan, 712 F. Supp. 1456 (D. Ore. 1989). We affirmed the dismissal of the NEPA claim, but reversed the dismissal of the non-NEPA claims. *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 1470 (1990). On October 23, 1989, Portland Audubon renewed its motion in the district court for summary judgment under the Oregon and California Lands Act, the Federal Land Policy and Management Act, and the Migratory Bird Treaty Act.

On February 8, 1989, the Seattle Audubon Society and other environmental organizations ("Seattle Audubon") filed a complaint in district court for declaratory and injunctive relief, challenging the United States Forest Service's ("Forest Service") administrative decision adopting certain timber management guidelines as affording inadequate protection to the northern spotted owl. A month later, the Washington Contract Loggers Association also filed suit, challenging the guidelines as overly restricting timber harvesting. Seattle Audubon and the Washington Contract Loggers Association moved for preliminary injunctions. The district court initially denied both motions, but later granted Seattle Audubon's renewed motion for a preliminary injunction and enjoined certain planned timber sales.

Meanwhile, Congress passed section 318, which went into effect October 23, 1989. The "Northwest Timber Compromise," inter alia, requires the Forest Service and BLM to sell in fiscal year 1990 7.7 billion board feet of timber, of which 5.8 billion is to come from Oregon and Washington. § 318(a)(1). Section (b)(3) sets out a timber management plan for national forest lands in Oregon and Washington. Under this section, no sales are to come from Spotted Owl

Habitat Areas identified in the Environmental Impact Statement and Record of Decision of 1988, prepared in relation to proposed timber sales on Forest Service land. Section (b)(3) also adds about 2,300 acres to the protected forest areas in the affected national forests. § 318(b)(3). Section (b)(5) sets out a timber management plan for certain BLM lands in Oregon. Under this section, no sales are to come from areas identified as Spotted Owl Habitat Areas in an agreement between BLM and the Oregon Department of Fish and Wildlife, dated December 22, 1987. Section (b)(5) also directs BLM to identify an additional 12 protected areas on affected BLM land. § 318 (b)(5).

At the heart of these appeals is section 318 (b)(6)(A), which specifically refers to the two cases now before us and provides:

> Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 12, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for

> the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

On November 6, 1989, based on section 318 the district court in *Seattle Audubon* vacated the preliminary injunction. The district court rejected Seattle Audubon's argument that section 318(b)(6)(A) violates the separation of powers doctrine and is therefore unconstitutional. The district court retained jurisdiction over the case and certified for interlocutory appeal under 28 U.S.C. § 1292(b) its decision to vacate the preliminary injunction. On December 21, 1989, the district court in *Portland Audubon* granted the government's motion to dismiss, based on section 318, over Portland Audubon's constitutional challenge to section 318(b)(6)(A).

Portland Audubon and Seattle Audubon filed timely notices of appeal. We have jurisdiction over Seattle Audubon's interlocutory appeal in *Seattle Audubon* under 28 U.S.C. § 1292(b) and over the district court's final order in *Portland Audubon* under 28 U.S.C. § 1291.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law. We therefore review the district courts' rulings de novo. *Trerice v. Pederson*, 769 F.2d 1398, 1400 (9th Cir. 1985).

DISCUSSION

The Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, —— U.S. ——, 109 S. Ct. 647, 658 (1989). In this case we must decide whether, in enacting section 318, Congress went beyond the limits of its power established in the Constitution.

By section 318, Congress for the first time endeavors to instruct federal courts to reach a particular result in pending cases identified by caption and file number. Subsection (b)(6)(A) raises serious constitutional concerns in light of Article III's stated premise that the judicial power of the United States, encompassing cases and controversies, lies in the federal courts and not in Congress.

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), the Supreme Court struck down an act of Congress because it violated the separation of powers doctrine. The plaintiff in *Klein*, the administrator of the deceased owner of property sold by federal agents during the Civil War, sued for proceeds of that sale under a law that gave a cause of action to recover such proceeds to noncombatant confederate landowners upon proof of loyalty to the federal government. The Supreme Court, in an earlier case, decided that receipt of a Presidential pardon was sufficient proof of "loyalty" under this law. Because the deceased landowner in *Klein* had received a pardon, the court of claims awarded recovery. Pending the government's appeal from the court of claims' decision, Congress passed a statute providing that no pardon was ad-

missible as proof of loyalty to the federal government and that acceptance of a pardon, under most circumstances, was conclusive evidence of disloyalty. The statute directed the Supreme Court and the court of claims to find that a claimant who accepted a Presidential pardon without disclaiming previous disloyalty was in fact disloyal and, therefore, not entitled to land sale proceeds under the law which allowed a noncombatant confederate claimant to receive those proceeds upon proof of loyalty. The newly enacted statute further directed the Supreme Court to dismiss any case in which a claimant had prevailed in the court of claims if the claimant prevailed upon proof of loyalty by Presidential pardon.

The Court explained that the effect of the statute was to deny jurisdiction to the Supreme Court and court of claims "solely on the application of a rule of decision, in causes pending prescribed by Congress." *Id.* at 146. This, the Court held, Congress could not do: "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." *Id.* Because Congress had "prescribe[d] a rule for the decision of a cause in a particular way," Congress "passed the limit which separates the legislative from the judicial power," and the provision was declared unconstitutional. *Id.* at 146-47.

Significantly, the Court in *Klein* distinguished an earlier, similar case, *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). There, the Court had originally held that a bridge was an obstruction. Intervening legislation, however, made the bridge a post-road for passage of the United States mail and required that navigation not interfere with the bridge. The Court concluded in

Wheeling Bridge that this new statute *changed* the previous law. "[A]lthough [the bridge] still may be an obstruction in fact, [it] is not so in the contemplation of law." *Id.* at 430. The court, therefore, decided the case on the theory that Congress had changed the law, not that Congress had told the court that it should decide the case differently under the same law. As such, *Wheeling Bridge* differed from *Klein* in a critically important aspect: "No arbitrary rule of decision was prescribed in [*Wheeling Bridge*], but the court was left to apply its ordinary rules to the new circumstances created by the act. In [*Klein*], no new circumstances, ha[d] been created by legislation." *Klein*, 80 U.S. at 146-47.

Congress exists to write and change our laws, and the courts are bound to apply the law extant at the time of decision. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). We read *Klein* and *Wheeling Bridge*, however, as delineating limits of congressional power to control litigation through legislation. Congress can *amend or repeal* any law, even for the purpose of ending pending litigation. *Wheeling Bridge*, 59 U.S. at 421; *see also State of Ark. v. Goldschmidt*, 627 F.2d 839, 842 (9th Cir. 1980) (appeal rendered moot by legislation). But Congress cannot "prescribe a rule for a decision of a cause in a certain way" where "no new circumstances have been created by legislation." *Klein*, 80 U.S. at 147.

More recent Supreme Court authority also strongly suggests that the critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repeal-

ing or amending the law underlying the litigation, which is not permissible. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980) (reason the statute at issue in *Klein* was unconstitutional was that "it prescribed a rule of decision in a case pending before the courts").

Though the precise contours are difficult to discern, we have recognized the limits the Constitution puts on congressional power to control federal courts' jurisdiction. In *Konizeski v. Livermore Labs (In re Consolidated United States Atmospheric Testing Litigation)*, 820 F.2d 982, 992 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), we noted that "[c]ongressional attempts to alter the rule of decision in pending cases in favor of the government have been condemned as a violation of Article III." But despite this broad language, *Atmospheric Testing* interpreted *Klein* restrictively: "'Congress violates the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' *and* purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'" *Atmospheric Testing*, 820 F.2d at 992 (emphasis added) (quoting *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and The Federal System*, 316 n.4 (2d ed. 1973))).

In a case decided last year, *Grimsey v. Huff*, 876 F.2d 738 (9th Cir. 1989), we clarified this restrictive language by making the *Atmospheric Testing* holding disjunctive rather than conjunctive. 876 F.2d at 744.

This interpretation is consistent with the language of the Supreme Court's decision in *Klein* and with subsequent Court authority on the separation of pow-

ers doctrine. *See United States v. Sioux Nation of Indians*, 448 U.S. at 404-05. We thus conclude that Ninth Circuit law does not require *both* a finding that Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law, *and* that a challenged statute be independently unconstitutional on other grounds. Reading *Klein* in the conjunctive would require that Congress' action be unconstitutional on two grounds—an illogical requirement.

The issue before us, then, is whether section 318 is a permissible modification of the law underlying the two cases before us, as the district courts held, or an impermissible directive from Congress to the courts to decide the cases in a particular way. We conclude that subsection (b)(6)(A) runs afoul of the separation of powers doctrine.

Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements.[1] The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases. Thus, if the Secretary does follow subsections (b)(3) and (b)(5) by observing their limitations on owl habitat, then the Secretary will be deemed in fact to have met as well the requirements of several environmental statutes.

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[1] For example, subsection (b)(2) requires that fragmentation of ecologically significant old growth forest stands be minimized, and subsections (b)(3) and (b)(5) forbid timber sales in specified areas where spotted owls are found.

In this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution. For example, if the Secretary follows subsections (b)(3) and (b)(5), then the Secretary will be found to have used the "principles of multiple use and sustained yield" and the "systematic interdisciplinary approach" mandated by the Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(1) and (2). In addition, the agency will be deemed to have included detailed statements of adverse environmental effects and alternatives required under NEPA, 42 U.S.C. § 4332. Also, there will have been no taking of habitat as proscribed under the Migratory Bird Treaty Act, 16 U.S.C. § 703.

Subsection (b)(6)(A), at issue here, does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court. This is what *Klein* and subsequent cases agree is constitutionally proscribed. *See Grimesy v. Huff*, 876 F.2d at 738 (no constitutional violation because "the statute in question neither direct[ed] the court to make a certain finding of fact nor requir[ed] [the court] to apply an unconstitutional law" (quoting *Atmospheric Testing*, 820 F.2d at 992)); *see also United States v. Sioux Nation of Indians*, 448 U.S. at 404-05.

It is this key aspect that distinguishes subsection (b)(6)(A) from the statutory provisions we upheld in *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989). In that case, an appropriations bill provision directed the Secretary of Transportation to build a highway—the subject of prolonged litigation under various environmental protection statutes—"notwithstanding" those environmental statutes' require-

ments. The statute challenged in *Stop H-3* simply ordered construction of the highway and specifically, as a matter of permanent law, *withdrew* the statutory environmental protection provisions underlying the ongoing litigation as to the challenged project by exempting the project from the provisions' requirements. *Id.* at 1437.[2] The provision at issue in *Stop H-3* did *not* leave the underlying statute intact (as to the H-3 project), order a course of government atcion, and then direct a court finding that the environmental statutes' requirements were satisfied by the government action ordered. That is what Congress did when it enacted section 318, at issue in the present case.

We must uphold a statute if "it is fairly possible to interpret the [challenged] statute in a manner that renders it constitutionally valid." *Communication Workers of Am. v. Beck*, —— U.S. ——, 108 S. Ct. 2641, 2657 (1988). That Congress could possibly have written a valid statute, however, does not mean that we can "fairly" interpret the statute that Con-

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[2] Section 114 of the Continuing Appropriations Bill for Fiscal Year 1987, Pub. L. No. 99-500, 100 Stat. 1783 (later reenacted as Pub. L. No. 99-591, 100 Stat. 3341) stated in relevant part:

> (a) The Secretary of Transportation shall approve the construction of Interstate Highway H-3 between the Halawa interchange to, and including the Halekou interchange (a distance of approximately 10.7 miles), and such construction shall proceed to completion *notwithstanding section 23 and section 303 of title 49, United States Code.*

(Emphasis added.) Sections 138 and 303, the so-called "4(f)" provisions, require the Secretary of Transportation, before building a highway through certain ecologically important areas, to take various steps in order to protect the environment.

gress in fact enacted as constitutionally valid. The language of section 318 is clear: Congress not only legislated a forest management plan, §§ 318(b)(3), (b)(5), but also directed the courts to find that that plan satisfied the environmental laws underlying the ongoing litigation. § 318(b)(6)(A). In doing so, Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for the decision of a cause in a particular way, without changing the underlying laws, as it unquestionably cannot do.[3]

We note further that, even if we could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes. That is what we held in *Portland Audubon Soc'y v. Hodel*, 866 F.2d at 307, Congress could not do in an appropriations measure. In so holding, we followed the Supreme Court in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). These principles preclude a saving interpretation of subsection (b)(6)(A).

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[3] We are not persuaded that the legislative history of section 318 requires a different conclusion. The House report accompanying the measure does state that section 318(b)(6)(A) "does not pass on the legal sufficiency of the existing Forest Service [Record of Decision] or the [Bureau of Land Management/Oregon Department of Fish and Wildlife] agreement insofar as each addresses concerns about the northern spotted owl." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 88-89 (1987). The same report, however, states that section 318 "in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities." *Id.* at 89. We decline to read these mixed signals to change the plain meaning and effect of subsection (b)(6)(A).

CONCLUSION

Although the legislative history of section 318 disguises the act as changing legal standards, the statutory language itself does not do so. The first sentence of subsection (b)(6)(A) violates the separation of powers doctrine.[4]

The judgments of the district courts are REVERSED. The cases are remanded to the district courts for proceedings consistent with this opinion. This order shall act as and for the mandate in these cases and the pending motion to recall the mandate is denied.

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[4] We express no opinion on the validity of the second and final sentence of subsection (b)(6)(A).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 90-35020, 90-80008

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES DEFENSE COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON, in his official capacity as Chief, United States Forest Service; UNITED STATES FOREST SERVICE, an agency of the United States, DEFENDANTS-APPELLEES

No. 90-35120

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES DEFENSE COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON; UNITED STATES FOREST SERVICE, DEFENDANTS-APPELLEES

NORTHWEST FOREST RESOURCE COUNCIL; ASSOCIATION OF O & C COUNTIES, DEFENDANTS INTERVENORS-APPELLEES

ORDER

[Filed Jan. 16, 1991]

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges

The panel as constituted above voted to deny the petitions for rehearing by Northwest Forest Resource Council and Washington Contract Loggers' Association and to reject the suggestion for rehearing en banc. The panel also voted to deny the motion for recall of the mandate by the federal appellees and to reject their suggestion for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The motion for recall of the mandate and the petitions for rehearing are denied. The suggestions for rehearing en banc are rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-160WD

SEATTLE AUDUBON SOCIETY, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

No. C89-99(T)WD

WASHINGTON CONTRACT LOGGERS ASSOCIATION, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

[Filed Nov. 14, 1989]

MEMORANDUM DECISION RE
CONSTITUTIONALITY AND RETENTION
OF JURISDICTION

I. INTRODUCTION

This memorandum decision supplements the order entered on November 6, 1989, holding section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. 701, 745-50 (1989) ("section 318"), to be constitutional. Section 318 became law on October 23, 1989. The net result of the legislation, after a prolonged battle in Congress, is to set aside, for one year, certain requirements of the environmental laws so that logging may go forward in old-growth national forest areas that contain spotted owl habitat. The November 6 order was issued in brief form because of the need for a prompt ruling. Today's order gives further reasons for the constitutionality holding, and rules that the court will retain jurisdiction rather than dismissing these cases.

A summary of the earlier proceedings in these cases is given in the November 6 order at pages 2-5.

II. CONSTITUTIONALITY

The policy issues debated by Congress, and resolved for the moment (but no longer) by section 318, are so important and volatile that a few words must be said about the role of the courts.

The United States Constitution is grounded on a careful separation of powers among the three branches of government. The Supreme Court has said: "This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, —— U.S. ——, 109 S. Ct. 647, 658, 102 L. Ed. 2d 714 (1989). Congress legis-

lates, the executive branch carries out the laws and proposes new ones, and the courts apply the laws to the cases that come before them.

If our system is to work, each branch of government must faithfully respect the constitutional limits of its powers. *INS v. Chadha*, 462 U.S. 919, 951, 103 S. Ct. 2764, 2784, 77 L. Ed. 2d 317 (1983) (separation of powers designed "to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility").

In managing the federally-owned public lands, it is Congress, not the courts, that must make the policy decisions. *Kleppe v. New Mexico*, 426 U.S. 529, 536, 96 S. Ct. 2285, 2290, 49 L. Ed. 2d 34 (1976) ("the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there"); *see also Miller v. Youakim*, 440 U.S. 125, 142 n.21, 99 S. Ct. 957, 967 n.21, 59 L. Ed. 2d 194 (1979) ("issue[s] of legislative policy . . . [are] better addressed to the wisdom of Congress than to the judgments of this Court") (internal quotation marks omitted). A judge might feel that the opponents of section 318 are right in arguing that it will sacrifice a priceless and irreplaceable part of the wilderness while doing nothing to solve the chronic timber supply problem of local mills. Or he might feel that others are right in arguing that jobs will be saved and that enough old growth is already protected in parks and wilderness areas. He might think the country would be well advised to leave the policy decision to him. But the country and the Constitution have not done that. The role of the courts is and must be limited to deciding whether the law passed by Congress and signed by the President is constitutional. If it is, it must be upheld

whether it is wise or foolish. Courts must not strike down laws as unconstitutional merely because they disagree with them. *Chadha*, 462 U.S. at 944, 103 S. Ct. at 2780; *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976).

In the present cases the plaintiffs Seattle Audubon Society, et al. ("SAS"), have challenged the constitutionality of subsection (b)(6)(A) of section 318. This is the only part of section 318 challenges of any party. However, it should be read in context. A copy of section 318 is attached as Exhibit A to the order of November 6, 1989. A copy of the Congressional conference report, H.R. Conf. Rep. No. 2788, 101st Cong., 1st Sess. 86 (1989) [hereinafter Conference Report], is attached as Exhibit B to that order.

SAS raises two issues regarding subsection (b)(6)(A): Whether Congress was impermissibly directing the result in a pending case, and whether the bar to federal judicial review of the one-year guidelines adopted by the statute is constitutional.

The separation of powers doctrine bars Congress from directing a particular decision in a pending case. *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 404, 100 S. Ct. 2716, 2735, 65 L. Ed. 2d 844 (1980) (citing *Klein*): *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 992 (9th Cir. Cir. 1987) ("*Atmospheric Testing*") (same), *cert. denied*, —— U.S. ——, 108 S. Ct. 1076 (1988); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 47 n.6 (1975).

However, subsection (b)(6)(A) does not require a particular decision on the issues of this case. Instead, it provides that for fiscal year 1990 the new standards adopted by Congress in subsections (b)(3) and (b)(5) will apply, and will be adequate for that year. In other words, Congress has adopted the Forest Service's proposed guidelines, challenged by both sets of plaintiffs in these cases, as statutory law for a period of one year. Congress clearly has the power to do this. In *Stop H-3 Association v. Dole*, 870 F.2d 1419, 1430 (9th Cir. 1989), plaintiffs sued to enjoin construction of a highway they contended would be damaging to the environment. While the case was pending, Congress enacted legislation "carving out a local exception to a national [environmental] policy" to allow the highway to be built. *Id.* The Ninth Circuit held that Congress has the power to make exceptions to rights it or state legislatures have created by statute. *Id.*

Just as Congress may create a geographic exception to the environmental laws, it may also create a temporal exception. It has done that here. Subsections (b)(3) and (b)(5), adopting the standards which subsection (b)(6)(A) deems adequate, apply only to that year. *See* Conference Report, *supra*, at 87 ("These measures included in this provision have been provided on an interim basis for fiscal year 1990 only . . . .").

Congress has expressly said that it was not "passing on the legal and factual adequacy of the [FSEIS] and the accompanying [ROD]." § 318(b)(6)(A), 103 Stat. at 47; *see also* Conference Report, *supra*, at 88-89 ("Section (b)(6)(A) does not pass on the legal sufficiency of the existing Forest Service ROD . . . insofar as [it] addresses concerns about the northern spotted owl.").

The court is to construe federal statutes "so as to avoid serious doubts as to their constitutionality, and when faced with such doubts the [c]ourt will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, —— U.S. ——, 108 S. Ct. 2641, 2657, 101 L. Ed. 2d 634 (1988). Section 318 can and must be read as a temporary modification of the environmental laws. As such it is well within Congress's constitutional power.

The remaining question raised by SAS has to do with the last sentence of subsection (b)(6)(A), which provides that the guidelines temporarily adopted by subsections (b)(3) and (b)(5) "shall not be subject to judicial review by any court of the United States." The federal courts other than the Supreme Court have been created by Congress and, in general, Congress may restrict their jurisdiction. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L. Ed. 1147 (1850); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 551, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962); *Antolok v. United States*, 873 F.2d 369, 374 (9th Cir. 1989). The extent of Congress's power to do that does not need to be discussed here. Subsection (b)(3) provides, after setting forth certain acreage requirements for spotted owl habitat: "All other standards and guidelines contained in the Chief's Record of Decisions are adopted." That provision turns those standards and guidelines into temporary statutory law. The provision in subsection (b)(6)(A) that the adopted guidelines "shall not be subject to judicial review" means only that, as new statutory law, the guidelines cannot be tested in court for compliance with the National Forest Management

Act, the National Environmental Policy Act, or other general environmental statutes.

SAS relies on three cases in contending that subsection (b)(6)(A) is unconstitutional. The Supreme Court's holding in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871), does not apply to a statute—such as section 318—that "neither directs the court[s] to make a certain finding of fact nor requires them to apply an unconstitutional law, [and therefore does not offend] the separation of powers doctrine." *See Atmospheric Testing*, 820 F.2d at 992 (quoting *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (internal quotation marks omitted)). Neither of the other two cited cases ruled on the questions at issue here. In *Cerro Metal Products v. Marshall*, 467 F. Supp. 869 (E.D. Pa. 1979), *aff'd*, 620 F.2d 964 (3d Cir. 1980), the trial court held that an agency rule promulgated during a pending case did not bind the court. In *Personal Finance Co. v. United States*, 86 F. Supp. 779 (D. Del. 1949), the issue was whether a staute should be given retroactive effect.

As stated in the November 6 order:

> Congress has the power to modify the application of these [environmental] statutes in the management of public lands, and in section 318 it has exercised that power by adopting temporary standards and exemptions in regard to national forests in Washington and Oregon.

Order Determining Section 318(b)(6)(A) of Act to be Constitutional, etc., at 6 (Nov. 6, 1989).

For the reasons stated, subsection (b)(6)(A) is constitutional. No other part of section 318 has been challenged. It should be noted that no party has argued that the statute would prevent judicial re-

view of administrative action challenged under the Constitution or for alleged noncompliance with section 318 itself.

III. RETENTION OF JURISDICTION

The final question is whether the court should dismiss these cases or retain jurisdiction. Congress can enact legislation that moots a pending case. *See, e.g., Bowen v. Kizer*, 485 U.S. 386, 108 S. Ct. 1200, 99 L. Ed. 2d 402 (1988). Where a congressional action "cuts the basis from under [a] controversy" and makes it "purely academic," the case is moot and should be dismissed. *Arkansas v. Goldschmidt*, 627 F.2d 839, 842 (8th Cir. 1980). Congress has not done that here. To the contrary, it has plainly stated that it did not mean to decide these cases, or to suggest what their final outcome should be. Conference Report, *supra*, at 89 ("Nothing in [section 318] is intended to prejudge any . . . final decisions that may be reached by a Federal court in the *Seattle* Audubon/Washington Contract Loggers Assoc. v. *Robertson* cases . . . ."); *see also* § 318(b)(6)(A), 103 Stat. at 47; Conference Report, *supra*, at 88. It has referred to proceedings in the cases that will come after adoption of the statute and after reconsideration of the ROD over the next year. *Id.* at 88-89. Section 318 alters the rules of the controversy for the next year, but it does not end the controversy. *Cf. Baxley v. Rutland*, 409 F. Supp. 1249 (M.D. Ala. 1976). The texts of the statutes and the conference report show that Congress expected these cases to go forward.

Whether or not the ROD is amended as a result of the process mandated by section 318, its legality under the environmental laws will still have to be

decided. In the meantime, section 318 permits judicial review of proposed timber sales in the affected areas on an expedited basis. § 318(g). Given the short timetable mandated by Congress, it is important that the parties be able to proceed by motion in these cases rather than having to start a new lawsuit.

For these reasons the cases will not be dismissed and the court will retain jurisdiction. A general stay of proceedings is not necessary or desirable. However, further discovery will be taken only by leave of court.

The clerk is directed to send copies of this order to all counsel of record.

Dated: November 14, 1989.

/s/ William L. Dwyer
WILLIAM L. DWYER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-160WD

SEATTLE AUDUBON SOCIETY, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

No. C89-99(T)WD

WASHINGTON CONTRACT LOGGERS ASSOCIATION, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

[Filed Nov. 6, 1989]

ORDER DETERMINING SECTION 318(b)(6)(A) OF ACT TO BE CONSTITUTIONAL, VACATING PRELIMINARY INJUNCTION, AND VACATING HEARING DATE

On October 23, 1989, the President signed into law section 318 of the Department of Interior and Related Agencies Appropriations Act for fiscal year 1990, Pub. L. No. 101-121 ("section 318"). The court had asked all parties in these cases to file briefs on the impact of that bill, if adopted, on this litigation. The last briefs were filed on November 2, 1989. Also on November 2, briefing was completed on a motion of the plaintiffs in No. C89-99 to vacate the November 13 final hearing date.

Four basic questions are raised by the parties' briefs:

1. Is subsection (b)(6)(A) of section 318 constitutional?
2. Should the preliminary injunction be vacated?
3. Should the November 13 final hearing date be vacated?
4. Should these cases be dismissed as moot or, if not, should all proceedings in them be stayed?

A brief resume of these cases is necessary. Seattle Audubon Society, et al. ("SAS"), and Washington Contract Loggers Association, et al. ("WCLA"), both brought suit earlier this year against F. Dale Robertson, et al. (the "Forest Service"), challenging the legality of an administrative decision of the Forest Service adopting standards and guidelines for managing northern spotted owl habitat in the national forests of Washington and Oregon, the administrative decision is set out in a Record of Decision ("ROD"). For opposite reasons, the two sets of plaintiffs challenged the Forest Service's plan under the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA") and their implementing regulations. SAS also relied on the Migratory Birds Treaty Act ("MBTA") and its implementing regulations.

The court consolidated the two cases, ordered them expedited, and set a final hearing date of June 13, 1989, after obtaining the parties' views on the time they needed to complete their prehearing work.

Both sets of plaintiffs sought preliminary injunctive relief before the final hearing. The WCLA motion was denied. The SAS motion as originally framed was denied as being overbroad; however, the order that was entered preserved the right of all parties to seek preliminary relief as to site-specific timber sales. A revised motion for preliminary relief by SAS, listing specific timber sales, was granted by order of March 24, 1989. The court found at that time that "the balance of irreparable harm tips sharply in favor of preserving the status quo between now and the final hearing set for June 13, 1989." As later amended, the preliminary injunction deferred 163 timber sales in Washington and Oregon for what then appeared to be a few weeks until the final hearing was held.

On May 11, 1989, the Forest Service moved for a stay of all proceedings in these cases pending completion of a conference process between the Forest Service and the Fish and Wildlife Service ("FWS"). The latter agency had announced on April 25, 1989, its decision—reversing an earlier decision—to list the northern spotted owl as "threatened" under the Endangered Species Act. The Forest Service argued that the inter-agency conference process required by law could have "varied and profound effects" on the ROD—in other words, that the court could end up reviewing a much different administrative decision than the one challenged by the plaintiffs. Memorandum in Support of Defendants' Motion for Stay at 2 (May 11, 1989). SAS and WCLA agreed that a stay was warranted.

In seeking a stay the Forest Service proposed a temporay ban on timber sales containing forty or more acres of spotted owl habitat. It stated that "the Forest Service will not offer timber sales containing forty or more acres of suitable spotted owl habitats prior to returning to this Court." *Id.* at 3.

On May 26, 1989, the court granted the requested stay of proceedings, kept the preliminary injunction in effect until further order, and, as proposed by the Forest Service, directed that during the stay the agency would not offer timber sales containing forty or more acres of suitable spotted owl habitat. The right of all parties to seek modifications of the stay order was preserved.

In applying for the stay the Forest Service said that it hoped to present within thirty days interim measures to protect spotted owl habitat during the pendency of the FWS listing process. Declaration of James C. Overbay at 3-4 (May 11, 1989). However, no such measures were announced within thirty days or afterward.

On August 24, 1989, the Forest Service moved for leave to go forward with eleven timber sales that were covered by the preliminary injunction. It relied upon letters written by the FWS to supervisors of four national forests. At this time there was no spotted owl management plan in effect. The Forest Service advised that the inter-agency conference process was going to take longer than first expected, and that "an inter-agency spotted owl conservation plan is being developed and is due for submission to agency leaders within six months." Defendants' Reply to SAS' Memorandum, etc., at 3 (Sept. 7, 1989). Thus, what had appeared to be a short delay when the Forest Service first requested it now appeared to be a delay of many months.

The court asked for the parties' views on whether the stay should be lifted. The Forest Service argued that the stay and preliminary injunction should remain in effect. SAS responded that the stay should be lifted. WCLA took no position.

The court lifted the stay and ordered that an expedited final hearing be rescheduled. This order, entered September 12, 1989, also consolidated with the final hearing the Forest Service's motion regarding the eleven timber sales.

After hearing from the parties on the time they needed to get ready, the court on September 28 entered an Order Scheduling Final Hearing and Remaining Pre-Hearing Steps. The final hearing was set for November 13, 1989.

A fuller history of the case is set out in the Order Lifting Stay, etc., entered September 12, 1989.

Congress in the meantime was debating legislation which would provide a short-term supply of national forest timber to mills in Washington and Oregon without having the usual type of agency action subject to judicial review. The final result was section 318, which became law on October 23, 1989. A copy of section 318 is attached as Exhibit A to this order. A copy of the relevant parts of the conference report is attached as Exhibit B. The parties' briefs on the impact of this legislation on the present cases have been fully considered, and the court now finds and rules as follows:

1. Subsection (b)(6)(A) of section 318 is constitutional. Whether the enactment is wise or not is for Congress, not the courts, to determine. A memorandum decision in regard to constitutionality will follow.

2. The preliminary injunction as originally issued, and as later extended at the Forest Service's re-

quest, was based upon acts of Congress, especially the National Forest Management Act, 16 U.S.C. § 1000 *et seq.*, the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedures Act, 5 U.S.C. § 705. Congress has the power to modify the application of these statutes in the management of public lands, and in section 318 it has exercised that power by adopting temporary standards and exemptions in regard to national forests in Washington and Oregon. As a result the preliminary injunction in these cases must be and hereby is vacated, and the parties will proceed in accordance with section 318.

3. It would be untimely to hold a hearing at this point, and the November 13, 1989, hearing date is hereby vacated.

4. A separate order will follow on whether the court should now dismiss these cases or retain jurisdiction.

The clerk is directed to send copies of this order to all counsel of record.

Dated: November 6, 1989.

/s/ William L. Dwyer
WILLIAM L. DWYER
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 87-1160-FR

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, PLAINTIFFS

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior, DEFENDANT and

NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN & WRIGHT LOGGING CO., FRERES LUMBER CO., INC., LONE ROCK TIMBER CO., INC., SCOTT TIMBER CO., CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, INC., ASSOCIATION OF O & C COUNTIES and BENNETT COUNTY, DOUGLAS COUNTY FOREST PRODUCTS COMPANY, MEDFORD ROGGEE FOREST PRODUCTS, INC., DEFENDANT-INTERVENORS

[Filed Dec. 21, 1989]

OPINION

FRYE, Judge:

The matter before the court is defendant's motion to dismiss for mootness (#397).

INTRODUCTION

This is an action for declaratory and injunctive relief filed by plaintiffs, Portland Audubon Society, Headwaters, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Salem Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council. Plaintiffs have alleged violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Oregon & California Lands Act, 43 U.S.C. § 1181, the Federal Lands Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, and the Administrative Procedures Act (APA), 5 U.S.C. § 553 *et seq.*

On September 6, 1989, the United States Court of Appeals for the Ninth Circuit affirmed this court's determination that plaintiffs' first claim for relief under NEPA should be dismissed and remanded the action for further determination of the second, third and fourth counts of plaintiffs' complaint. *Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989).

Plaintiffs thereafter renewed their motion for summary judgment on the second claim under the Oregon & California Lands Act and the fourth claim under the Migratory Bird Treaty Act. Defendant and intervenors oppose plaintiffs' motion for summary judgment on the grounds that Section 318 of the

Department of the Interior and Related Agencies Appropriations Act, 1990, Public Law 101-121 (October 23, 1989) (Section 318) requires dismissal of this action.

Plaintiffs respond that Section 318 is unconstitutional, and that even if Section 318 is constitutional, it does not render this action moot, and therefore the court should retain jurisdiction and deny the motion to dismiss.

ANALYSIS

Section 318 provides, in part, as follows:

> Without passing on the legal and factual adequacy of . . . the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections . . . (b)(5) of this section on . . . Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for . . . the case Portland Audubon Society et al. v. Manuel Lujan, J., Civil No. 87-1160-FR. The guidelines adopted by subsections . . . (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Section 318(b)(6)(A).

As to the issue of the constitutionality of Section 318(b)(6)(A), this court adopts the reasoning and result of the United States District Court for the Western District of Washington in *Seattle Audubon*

Society v. Robertson, Civil No. 89-160-WD, in its opinion filed November 14, 1989.

Congress has determined that the management of federal lands during the fiscal year 1990 as provided in Section 318 is in compliance with all statutes relied upon by the plaintiffs in this action, and this court is precluded from determining otherwise. Contrary to plaintiffs' assertions that this court can and should grant declaratory relief prior to the end of fiscal year 1990, this court concludes that it is without jurisdiction to grant any relief to plaintiffs based upon the adequacy of the BLM's timber management plan for fiscal year 1990.

Plaintiffs argue that this court should retain jurisdiction to resolve issues after fiscal year 1990 because there is an identifiable point at which the court will again be asked to consider the legality of the BLM's decisions. Defendant and intervenors argue that this court has no jurisdiction over this action at the present time, and that, in any event, the court should exercise its discretion and dismiss this action without prejudice to plaintiffs to refile a new action challenging any future decisions of the BLM in light of the directives of Congress to the parties in Section 318 (c)(1) to attempt to reconcile the interests represented in this litigation.

The administrative proceedings challenged in paragraphs 19 through 24 of the complaint for declaratory and injunctive relief are outdated and by the close of fiscal year 1990 cannot be the basis for a case or controversy. A moot action is one where "the issues presented are no longer 'live,'" *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam), and this action, as it is pled, has been resolved by Congress and therefore is moot. The Congressional Conference Report, H.R. Conf. Rep. No. 2788, 101st Cong., 1st

Sess. 86 (1989), which states that Section 318 should not be "construed to moot future action after fiscal year 1990 in the *Portland Audubon Society v. Lujan* case against current BLM owl management activities," fails to take into consideration that the case before this court does not involve "future action after fiscal year 1990" because such action has yet to be taken.

The agency action in this case is significantly different from the agency action at issue in *Seattle Audubon Society v. Robertson*, Civil No. 89-160-WD, because it has not effect after fiscal year 1990. In *Seattle Audubon*, the record of decision of the United States Forest Service issued on December 8, 1988 sets the regional standards and guidelines for the protection of the spotted owl in the development of Forest Plans for the United States Forest Service for up to five years. The record of decision, at page 14, states:

> At any time, but not later than 5 years from the date of record, this decision shall be reviewed based upon new information from the Spotted Owl Research, Development and Application Program, and any necessary adjustments in management direction to sustain population viability of spotted owls shall be made through amendments or revisions of Forest Plans.

In the case before this court, the current decision of the BLM was not to supplement the existing Environmental Impact Statements (EIS) prior to 1990. The decision of the BLM State Director dated April 10, 1987 not to order a supplemental EIS prior to 1990, at page 2, specifically relies upon the facts that "BLM has already started (in 1986) to develop new land use plans (resource management plans (RMP)) for these seven [timber management] areas. Those

RMP's are currently expected to be completed by October 1990." Unlike the record of decision of the United States Forest Service, the existing BLM decision will have no effect after fiscal year 1990 and will be replaced by a new management decision which the plaintiffs will be free to challenge.

Plaintiffs rely upon a series of cases in which the courts have retained jurisdiction over an environmental dispute pending the completion of a particular construction project. For example, in *Environmental Defense Fund v. Armstrong*, 487 F.2d 814 (9th Cir. 1973), the court retained jurisdiction over an eight-year water project to insure compliance with the rules of the National Environmental Protection Agency and to provide adequate protection for the interests of the parties. In *Environmental Defense Fund v. Froehlke*, 348 F. Supp. 338 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973), the court retained jurisdiction to review the sufficiency of an Environmental Impact Statement (EIS) to be prepared at later stages of a dam project.

It may be proper for a court to retain jurisdiction to resolve environmental disputes that arise during the completion of a particular construction project. However, the pending action presents a different sort of controversy. Plaintiffs ask the court to keep this case open so they can challenge the future management of BLM lands for timber sales. The management of BLM lands for timber sales is an ongoing function of the BLM, not a discrete project the BLM is completing. It is not the function of this court to oversee the BLM's management of federally-owned lands by continuing jurisdiction where no case or controversy exists. If this court were to retain jurisdiction under these circumstances, there could be no end

to this action so long as the BLM managed federally-owned lands for timber sales.

Dismissal of this action without prejudice to any party to challenge BLM actions after the 1990 fiscal year will not prejudice plaintiffs. Access to the federal courts is immediate. The requirement that a new complaint be filed is essential to the presentation of any future controversy. The filing fee is not prohibitive.

Dismissal of this action without prejudice to any future filing challenging agency actions after fiscal year 1990 advances congressional goals and judicial interests. The management of federally-owned lands by the Executive Branch is for Congress to oversee, and not the courts. The majority of the litigation in this action has been over the efforts of Congress to take the issues that are the subject of this litigation out of the courtroom and to concentrate efforts on the planning for the decade of the 1990's. Congress has directed that the defendant, Secretary of the Interior Manuel Lujan, Jr., name advisory boards on a district-by-district basis who represent the diversity of views in an attempt to provide the agency with recommendations in reviewing prospective timber sales. Section 318(c)(1). The BLM has long been under a directive of Congress to complete new resource management plans to replace the timber management plans that were used in the decade of the 1980's.

This court recognizes that there may be litigation challenging the agency decisions after the 1990 fiscal year. Future federal court litigation should be filed after the parties proceed in an orderly manner through the entire process established to challenge the management of federal lands. Any litigation

after fiscal year 1990 will represent new challenges to new efforts and will be more properly managed in a new case.

Defendant's motion to dismiss this action for mootness (#397) is granted without prejudice to the filing of any new action challenging the BLM owl management activities after fiscal year 1990.

DATED this 21st day of December, 1989.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

APPENDIX F

Section 318 of the Department of the Interior and Related Appropriations Act, Pub. L. No. 101-121, Tit. III, § 318, 103 Stat. 745-750 (1989), provides:

> (a) From funds appropriated under this Act or otherwise made available—
>
> (1) The Forest Service shall offer, notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984 (16 U.S.C. 618(a)(5)(C)), an aggregate timber sale level of seven billion seven hundred million board feet of net merchantable timber from the national forests of Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with existing land and resource management plans or land and resource management plans as approved except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, such sales shall be consistent with the preferred alternative of the draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986, pending approval of a final land and resource management plan for the Siuslaw National Forest: *Provided*, That of the seven billion seven hundred million board feet aggregate timber sale level for fiscal years 1989 and 1990, timber sales offered from the thirteen national forests in Oregon and Washington known to contain northern spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of

five billion eight hundred million board feet of net merchantable timber: *Provided further*, That the sales volume shall be distributed in the same proportion between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volume for fiscal years 1986 through 1988.

(2) The Bureau of Land Management shall offer such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its admininstrative districts in western Oregon.

(b)(1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted owls prepared or offered pursuant to this section shall minimize fragmentation of the most ecologically significant old growth forest stands. "Old growth forest stands" are defined as those stands meeting the criteria according to Forest Service Research Publication Numbered PNW-447. In those instances where the Forest Service, after consultation with the advisory boards established pursuant to subsection (c) of this section, determines that the definition in Forest Research Publication Numbered PNW-447 is not fully applicable in national forests known to contain northern spotted owls, the Forest Service shall use old-growth definitions contained in its Pacific Northwest Regional Guide.

(2) To the extent that fragmentation of ecologically significant old growth forest stands is necessary to meet the timber sale levels directed by subsection (a)(1) of this section, the Forest Service shall minimize such fragmentation in the ecologically significant old growth forest stands on a national forest-by-national forest basis based on the Forest Service's discretion in determining the ecologically significant stands after considering input from the advisory board created pursuant to subsection (c) of this section. The habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas (SOHAs) described in subsection (b)(3) of this section shall be considered an important factor in the identification of ecologically significant old growth forest stands.

(3) No timber sales offered pursuant to this Oregon and Washington known to contain northern spotted owls may occur within SOHAs identified pursuant to the Final Supplement to the Enviromental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection:

(A) For the Olympic Peninsula Province, which includes the Olympic National Forest, SOHA size is to be 3,200 acres;

(B) For the Washington Cascades Province, which includes the Mt. Baker-Snoqualmie, Okanogan, Wenatchee, and Gifford-Pinchot National Forests, SOHA size is to be 2,600 acres;

(C) For the Oregon Cascades Province, which includes the Mt. Hood, Willamette, Rogue River, Deschutes, Winema, and Umpqua National Forests, SOHA size is to be 1,875 acres;

(D) For the Oregon Coast Range Province, which includes Siuslaw National Forest, SOHA size is to be 2,500 acres; and

(E) For the Klamath Mountain Province, which includes the Siskiyou National Forest, SOHA size is to be 1,250 acres.

(F) All other standards and guidelines contained in the Chief's Record of Decision are adopted.

(4) In planning for the preparation and offer of timber sales authorized in subsection (a)(1) of this section, the Forest Service, to the extent possible in areas proximate to SOHA sites identified in subsection (b)(3) of this section, should exercise discretion in selecting sites and/or silvicultural prescriptions in order to retain spotted owl habitat characteristics in such areas. The Forest Service should consider the relative location and quality of such areas contiguous to the SOHAs and should give higher priority to prequality and less important location than to areas of greater quality and more important location relative to the SOHAs.

(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the

Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife and the United States Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

(6)(A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The

guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

(B) The Forest Service is directed to review and revise as appropriate the decision adopted in the December 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines for conservation of northern spotted owls developed by the Interagency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December 1988 decision determined to be necessary by the Forest Service are to be completed and in effect not later than September 30, 1990.

(c)(1) The Secretaries of Agriculture and the Interior shall name advisory boards on a national forest-by-national forest and Bureau of Land Management district-by-district basis which shall be comprised of not more than seven individuals who, in the appropriate Secretary's judgment, represent a diversity of views. In the process of selecting individuals to serve on the advisory boards, the Secretaries shall make every effort to recognize the diversity of views and perspectives and allow parties which represent a cross-section of those views to participate in making recommendations in the selection of board members, provided, that every effort will be made to ensure the advisory boards are comprised of an equal number of representatives of environmental and business concerns. The advisory boards shall be named not later than thirty days after enactment of this Act. The advisory boards

shall provide recommendations to the Forest Service and the Bureau of Land Management in reviewing prospective timber sales which shall meet the timber sale levels directed by this section prior to their offer. The advisory boards shall present their advice within fifteen or forty-five days after receipt of the necessary review documents. The fifteen-day period applies to single sales and the forty-five-day period applies to multiple sales. The members of the advisory boards authorized by this section shall serve without compensation or reimbursement of expenses. The Forest Service and the Bureau of Land Management are authorized to use available funds for the services of professional, independent facilitators to assist in the work of the advisory boards.

(2) The Forest Service and Bureau of Land Management shall consider the recommendations of the advisory boards once such boards are established pursuant to this section, including any suggested modifications of individual sales. The Forest Service and Bureau of Land Management shall also consider recommendations made by the United States Fish and Wildlife Service on those timber sales conferred upon under section 7(a)(4) or, if the spotted owl is listed as a threatened or endangered species, consult under section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1536(a)(2) and (a)(4)) prior to the offer of any subsequent timber sale in fiscal year 1990. These recommendations shall be considered regardless of whether the agreement provided in subsection (f)(1) of this section has been reached, entered into, and accepted by the relevant court.

Adoption or rejection of such recommended modifications shall not require preparation of additional environmental documents, notwithstanding any other provision of law.

(d) Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal of any decision by the Forest Service or the Bureau of Land Management to undertake any activity directed by this section for timber sales to be prepared, advertised, offered, and awarded during fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. If an administrative stay is granted in any such appeal the Regional Forester or the Interior Board of Land Appeals shall issue a final decision on the merits within forty-five days of the date of issuance of such stay. Notwithstanding any other provision of law, any party seeking to challenge a decision made after the date of enactment of this Act to prepare, advertise, offer, or award a timber sale in fiscal year 1990 from the thirteen national forests and Bureau of Land Management lands in western Oregon known to contain northern spotted owls need not exhaust their administrative remedies prior to filing suit. Nothing in this subsection shall alter the administrative appeal requirements of the Forest Service or Bureau of Land Management.

(e) Nothing in this section shall affect interagency cooperation among the Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service under sections

7(a)(2) and 7(a)(4) of the Endangered Species Act and its regulations.

(f)(1) Not later than two days after enactment of this Act, the Forest Service shall submit to plaintiffs in the captioned case Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160, a list of sales which had been prepared for offer in fiscal year 1989 and which contain at least 40 acres of suitable spotted owl habitat. Not later than fourteen days after receipt of such list, plaintiffs to the suit referenced in this subsection may enter into an agreement with the Forest Service releasing for sale not less than one billion one hundred million board feet of net merchantable timber. Such sales must be available for advertisement not later than fourteen days after the agreement required by this subsection is reached. Such timber sales selected shall not be subject to further judicial review by any court of the United States.

(2) If the agreement specified in subsection (f)(1) of this section is reached, then those timber sales described in the list submitted to plaintiffs pursuant to subsection (f)(1) of this section but not contained in the agreement authorized by subsection (f)(1) of this section shall not be offered for sale in fiscal year 1990.

(3) If the agreement authorized under subsection (f)(1) of this section is not implemented within the timeframes prescribed in subsection (f)(1) of this section, one billion one hundred million board feet of net merchantable timber from such sales submitted to plaintiffs pursuant to subsection (f)(1) of this section shall be se-

lected and modified as appropriate by the Forest Service in accordance with the provisions of this section. Selected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is a basis for any stay, injunction or order issued in the proceeding identified in subsection (f)(1) of this section; *Provided*, That nothing in this subsection shall affect rights available under the Contract Disputes Act (41 U.S.C. 601 et seq.).

(4) The Forest Service shall, for each respective timber sale, lift its own stay or apply to the appropriate court for the lifting of the restraining order or injunction whose basis has been withdrawn by this section.

(5) Timber sales selection pursuant to subsections (f)(1) or (f)(3) of this section shall be based on the following criteria: (1) proportional distribution between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volumes for fiscal years 1986 through 1988; (2) proportional distribution to the extent possible among the thirteen national forests known to contain northern spotted owls in Oregon and Washington based on the average sale volumes for fiscal years 1986 through 1988; and (3) to the extent possible, selection of sales outside the habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas described in subsection (b)(3) of this section.

(g)(1) No restraining order or preliminary injunction shall be issued by any court of the United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990

from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. The provisions of section 705 of title 5, United States Code, shall not apply to any challenge to such a timber sale: *Provided*, That the courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advise, offer, award, or operate such sale was arbitrary, capricious or otherwise not in accordance with law: *Provided further*, That any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale: *Provided further*, That for forty-five days after the filing of a challenge to a timber sale the affected agency shall take no action to award a challenged timber sale. Civil actions filed under this section shall be assigned for hearing at the earliest possible date and shall take precedence over all other matters pending on the docket of the court at that time except for criminal cases: *Provided further*, That the court shall render its final decision relative to any challenge within forty-five days from the date such challenge is brought, unless the court determines that a longer period of time is required to satisfy the requirements of the United States Constitution.

(2) Notwithstanding any other provision of law, the court may set rules governing the procedures of any such proceeding which set page limits on briefs and time limits on filing briefs and motions and other actions which are shorter

than the limits specified in the Federal rules of civil or appellate procedure.

(3) In order to reach a decision within forty-five days, the Federal District Court may assign all or part of any such case or cases to one or more Special Masters, for prompt review and recommendations to the court.

(h) The Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service shall submit reports updating their findings and progress as determined by the process recognized under subsection (e) of this section on a monthly basis to the President of the Senate and the Speaker of the House of Representatives for appropriate referral. Such reports shall also include information on the extent to which recommendations of the advisory boards established pursuant to subsection (c) of this section were integrated into timber sale decisions as well as reasons for modifying or not adopting recommendations made by the advisory boards. Such reports shall be submitted as directed beginning on December 1, 1989, and ending on September 30, 1990.

(i) Except for provisions of subsection (a)(1) of this section, the provisions of this section apply solely to the thirteen national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Management to develop similar policies on any other forest or district in Oregon or Washington.

(j) The advisory boards established under this section shall not be subject to the Federal Advisory Committee Act (86 Stat. 770).

(k) Timber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sale contracts. All other provisions of this section shall remain in effect until September 30, 1990.

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